IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.686 OF 2005

Ganpati Kalappa Deshinge (Wani)
since deceased thrugh LRs
(a) Champabai Ganapati Deshinge
and ors. .. Appellants

Versus

Shri Annu Sidhappa Deshinge (Wani)
and ors. .. Respondents

Mr.S.K.Chinchalikar for appellants

Mr.A.J.Chougule for respondent nos.1 and 2

CORAM : P.V.KAKADE, J.

DATE : 21ST JULY, 2005.

P.C.:

1. The appellants have preferred this appeal against the judgment and order passed by Addl.District Judge, Sangli dated 31.3.2005 allowing the appeal and setting aside the order passed by Civil Judge, Junior Division Miraj dated 18.7.2001 in Civil Suit No.116 of 1994 and decreed the suit.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The plaintiffs filed the suit for partition and injunction in respect of the suit property which comprise of two wells having Gat Nos.314 and 307 located at village Janravwadi, Tal. Miraj, Dist. Satara. The suit Well bearing Gat No.314 was previously having old Gat No.540 and old survey No.1415/2. Similarly another Well having Gat No.307 was initially old Survey No.145/3D. Both the suit Wells were initially owned by common ancestor of the parties. The dispute between the parties was in respect of shares in the suit Well.

. The learned judge on the basis of available evidence and after hearing both the parties came to the conclusion that the plaintiffs had proved that they had part of right over the suit Well and therefore, were entitled part partition. It was also held that the defendants had obstructed their possession. The suit was also held to be not bad for principle of res-judicata. The defendants had raised contention that in view of the fact that there was earlier R.C. Suit

No.64 of 1992 regarding the same issue involved in the present suit was not maintainable. The learned trial judge came to the conclusion that the suit was not partly maintainable that the part of the subject matter was bad and the suit regarding part of the property was maintainable and the suit was partly decreed. The appeal was carried to the District Judge. The learned District Judge after hearing both the parties and on the basis of available evidence came to the conclusion that the suit deserves to be decreed in toto and hence the appeal came to be allowed. Hence the present appeal.

4. At the outset, it may be noted that the only question of law sought to be raised in this appeal is with regard to the maintainability of the suit in view of the fact that there was earlier Suit bearing R.C.Suit No.64 of 1992 against the deceased Respondent No.1 and Respondent Nos.2 and 3 in the Court of Civil Judge, Junior Division, Miraj for perpetual injunction restraining the said respondents from causing obstruction in using the Well water situated in the land Gat No.314. The said suit was withdrawn and though the application was filed for permission to file suit on fresh cause of action, such permission was refused by

the trial court at that stage. On this background the present suit was filed for various reliefs including declaration of partition and injunction not only in respect of land Gat No.314 but also one more well i.e. suit Well no.2 situated in land Gat No.307.

. The learned counsel for the appellant submitted that the subject matter of the earlier suit was the same and therefore, the subsequent suit on the same cause of action was not maintainable by virtue of Order XXIII Rule 1 of C.P.C. In this regard it must be noted that "subject matter" as contemplated under Order XXIII Rule 1 would mean that bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been in respect of the same subject matter as the first suit. It is also to be noted that when cause of action and relief claimed in the second suit are the same as of cause of action and relief claimed in first suit, second suit cannot be considered to have been brought in respect of the same subject matter as first suit.

Therefore, on perusal of the pleadings in both the suits it is clear, as observed by the learned appellate court judge, that reliefs claimed in Regular Civil Suit No.64 of 1992 and present suit are altogether different and therefore, it cannot be said that cause of action of both the suits was the same. The learned counsel for the appellant also raised contention to the effect that the suit is also barred by provision of Order 2 Rule 2 of C.P.C. However, it is needless to mention that in order to invoke that provision following three conditions are required to be fulfilled (a) The previous and second suit must arise out of the same cause of action (b) both the suits must be between the same parties and (c) The earlier suit must have been decided on merits. Therefore, in Regular Civil Suit No.64 of 1992 the suit well no.2 was not the subject matter. That suit was against the present respondent no.1 (deceased) and respondent nos.2 and 3. Remaining respondents were not party in Regular Civil Suit No.64 of 1992 also, the said earlier suit is not decided on merits as it was withdrawn by the said plaintiff and therefore, I agree with the observation made by the learned appellate court judge that the suit is not barred under the said provision as submitted on behalf

of the appellant and present suit is in fact maintainable.

5. There is no other question of law involved in this appeal and all the issues are seen to be decided on the basis of factual evidence legally and properly and therefore, no interference is required by this Court.

6. In the result the appeal stands dismissed with no order as to costs. Consequently Civil Application No.1167 of 2005 also stands dismissed.